BRIAN J. STRETCH (CABN 163973)
United States Attorney

BARBARA J. VALLIERE (DCBN 439353)
Chief, Criminal Division

KEVIN J. BARRY (CABN 229748)
Assistant United States Attorney

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102-3495
Telephone: (415) 436-6840
FAX: (415) 436-7234
Email: kevin.barry@usdoj.gov

Attorneys for United States of America

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL TOMADA, Defendant.	NO. CR 14-0285 JST **UNITED STATES' SENTENCING MEMORANDUM** Hearing Date: January 27, 2017 Time: 9:30 a.m. Hon. Jon S. Tigar

INTRODUCTION

The defendant, Michael Tomada, stands before the Court to be sentenced following his guilty plea to Count One of the Indictment charging him with conspiracy to manufacture, to distribute, and to possess with intent to distribute a controlled substance (Xanax), in violation of 21 U.S.C. § 846. The government submits this sentencing memorandum to inform the Court that it has no objection to the Presentence Report and its recommended sentence of three years of probation, with the exception that the Court asks the Court to impose a period of 10 months of home detention.

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DEFENDANT'S OFFENSE CONDUCT

Co-defendant Jeremy Donagal operated a counterfeit Xanax (alprazolam) operation that was breathtaking in scope. Donagal had a manufacturing location that was capable of churning out over 1,000,000 Xanax tablets each week, and on at least one occasion, he surpassed that number. He had numerous industrial pill presses and industrial mixers, and he accepted orders for Xanax through several websites, including Silk Road, Silk Road 2.0, and a personal website for his most trusted customers. Donagal mailed tablets throughout the 48 contiguous United States, and he imported alprazolam powder, the critical raw material for his enterprise, from China. To insulate himself, Donagal hired individuals to perform key aspects of the operation, including receiving packages on his behalf.

At some point, Defendant began accepting packages for Donagal. Defendant agreed to accept domestic packages – containing cash – for $50 per package, and he agreed to accept international packages – with alprazolam powder from China – for $100 per package. PSR ¶ 25. Before partnering with Donagal in this way, Defendant had been one of Donagal's steroids customers, and he agreed to accept payment in the form of the dollar equivalent of steroids. Dkt. 316 at 2:23-25 (Plea Agreement).

SENTENCING GUIDELINES CALCULATION

The Guidelines cap the marijuana equivalence for Schedule IV controlled substances like Xanax at 9.99 kilograms: "the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of marihuana." U.S.S.G. § 2D1.1, Application Note 8(D) (Drug Equivalency Tables). The base offense level for between 5 and 10 kilograms of marijuana is 12. U.S.S.G. § 2D1.1(c)(14).

a.	Base Offense Level: (U.S.S.G. § 2D1.1(c)(14) – between 5 kg and 10 kg of marijuana)	12
b.	Acceptance of Responsibility: (3E1.1(a))	-2
c.	Adjusted Offense Level:	10

The Probation Officer correctly determined that Defendant has earned six criminal history points, meriting a CHC of III. With an adjusted offense level of 10, this results in a range of 10-16 months.

SECTION 3553(A) FACTORS

The factors listed under 18 U.S.C. § 3553(a) indicate that a term of 10 months' home detention as a condition of three years of probation is sufficient, but not greater than necessary, to achieve the goals of sentencing. *See United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008). The key factors in this case are the history and characteristics of the defendant, 3553(a)(1); the need for the sentence to afford adequate deterrence, 3553(a)(2)(B); the need for the sentence to provide for just punishment, 3553(a)(2)(A); the Guidelines range established for this type of crime and the defendant's criminal history, 3553(a)(4)(A)(i); and the need to avoid unwarranted sentencing disparities, 3553(a)(6).

In terms of the first factor identified above, Defendant has a significant criminal history, dating back over 20 years. PSR ¶¶ 42-49. On two separate occasions, Defendant was convicted of felony offenses and sentenced to three years in state prison. PSR ¶¶ 45, 49. This is in addition to other shorter, but nevertheless significant jail terms. PSR ¶¶ 43 (144 days), 44 (180 days), 46 (210 days). None of these felony convictions or periods of incarceration served to deter Defendant from engaging in the conduct to which he pleaded guilty in this case.

The PSR reports that Defendant has a stable family, with a wife and a daughter. PSR ¶ 73. He also has a well-paying job as a site supervisor at an insulation company. PSR ¶ 88. Although the PSR does not indicate this, apparently, Defendant also has a role in the union at his place of business, and on several occasions during the time of pretrial release the Court authorized his travel throughout California to attend union meetings and negotiations with management.

On the other hand, Defendant had the same marital relationship and the same job when he decided to become involved in the criminal activity in this case.[1] Defendant saw an opportunity to make easy money, knowing it was illegal. Despite the many previous stints in prison and in jail, he decided to break the law once again. None of the past periods of incarceration, and not even the risk to his family life and his employment, served any deterrent. It is unlikely that a term of probation for this case will have a greater deterrent effect than his prior periods of incarceration. Thus, the sentence imposed by the

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[1] Based on the timing, Defendant's 18-month old daughter had not yet been born when he began participating in Donagal's enterprise.

Court needs to have some dimension of punishment. 18 U.S.C. § 3553(a)(2)(A). A sentence of ten months of home detention, while minor when compared to the disruption in Defendant's life that would be created through ten months in custody, will have some punitive effect.

With respect to the Guidelines range, the Court must consider that despite the scale of the operation that Defendant assisted by accepting packages for Donagal, Congress and the Sentencing Commission have determined that dealing in Xanax does not merit a sentence of the same severity as other drugs. As a consequence, the Guidelines provide for a relatively low Guidelines range for Defendant's conduct. At the PSR indicates, his crime and character and crime fall well within the "heartland" of cases to which the Guidelines are intended to apply, and therefore, the sentencing range established for such offenses serves as an effective guide for determining a reasonable sentence. *See Rita v. United States*, 551 U.S. 338, 351 (2007); 18 U.S.C. § 3553(a)(4)(A). Thus a term of ten months in custody, which represents the low end of the applicable Guidelines range for Defendant's offense, would be appropriate in this case.

However, considering Defendant's post-arrest behavior, including not only gainful employment, but the fact that he has a supervisory role at his place of work and a role in the union, a lesser sanction that nonetheless has some "bite" is merited in this case. Such punishment would substitute 10 months of home detention, as a condition of three years of probation, for the 10 months of incarceration that serves as the low end of the Guidelines range. *See* U.S.S.G. § 5F1.2 ("Home detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment."). This sentence would significantly restrict Defendant's liberty for 10 months, while at the same time, would permit him to maintain his employment and to participate in the life of his family, particularly his young daughter. The fact that Defendant would be confined to his home for this period would signal that he is not getting a "pass" for his participation in Donagal's criminal enterprise, while at the same time, it would allow him to continue to demonstrate post-offense rehabilitation.

With respect to the need to address unwarranted sentencing disparities, the Court sentenced Jeremy Donagal, the leader of the enterprise, to 70 months, which was the low end of his applicable Guidelines range. Donagal was a CHC III, with an adjusted offense level of 25.

The Court sentenced co-defendant Michael Gonzales to a term of 27 months, which was also the low end of his range. Gonzales was a worker in Donagal's operation who mailed packages to customers and who did some work manning the pill presses. Gonzales had a more significant criminal history than Defendant, as he was a CHC IV, but he shared a similar offense level (11 as opposed to 10).

The Court sentenced co-defendant Duston Kirk to a term of 12 months and 1 day in custody, which was at the low end of his 12 to 18 month range (adjusted offense level 13, CHC I). Kirk was also a worker in Donagal's operation, but his role was more critical than others, as Kirk maintained the equipment. In addition, an aggravating factor in his sentencing was the fact that Kirk brought co-defendant Alicia Mitts into the scheme, directing her to wire funds to China in order to maintain the supply of alprazolam powder.

The Court sentenced co-defendant Lawrence Lindberg to a term of three years' probation. Lindberg was a worker in the operation, running pill presses that produced the counterfeit Xanax tablets and also mailing out packages containing customers' orders. Lindberg had no criminal history, (CHC I), and his adjusted offense level was 12, so the term of probation represented a slight downward variance.

The Court imposed a sentence of five years' probation on Thomas Elliot. Elliot's role was similar to that of Defendant, in that Elliot's principal function in the conspiracy was to receive packages, but Elliot also performed some work manufacturing Xanax tablets. The term of probation, which did not have a condition of home detention, was a variance from the 10-16 month Guidelines range for his conviction (adjusted offense level 12, CHC I).

The Court sentenced Kenneth Koskiniemi to a term of three years' probation. This was within the Guidelines range for Koskiniemi's offense, which was the purchase of 40,000 Xanax tablets from Donagal (CHC I, adjusted offense level 6).

Here, a term of three years of probation with 10 months of home detention is a light sentence. At the same time, however, it is close to the low end of Defendant's Guidelines range, with home detention substituted for custody, and it is commensurate with the downward variances the Court imposed when sentencing the co-defendants in this case, most of whom were more involved in the activities of the conspiracy than Defendant.

CONCLUSION

In full consideration of Defendant's history and characteristics, together with the goals of sentencing, the United States respectfully requests that the Court sentence Defendant Michael Tomada to serve ten months of home detention as a condition of three years of probation and to pay a $100 special assessment.

DATED: January 23, 2017

Respectfully submitted,

BRIAN J. STRETCH
United States Attorney

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KEVIN J. BARRY
Assistant United States Attorney –